PUBLIC PROSECUTOR

v.

CHUY PAK KAM

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[CRIMINAL TRIAL NO. 3/1981]
26 AUGUST 1982

CRIMINAL LAW AND PROCEDURE: *Possession of pistols and ammunitions - Recovered as a result of information given by accused - Validity of statement to police officer which led to the discovery - Denial by accused of the statement - Statement not produced at trial - Whether s. 114(g) Evidence Act arises - Failure of prosecution to call witness present when accused made statement - Whether affects the admissibility of statement - Exhibits recovered near public path.*

CRIMINAL LAW AND PROCEDURE: *Definition of word "control" - Whether accused had exclusive control over the place, hence the hand - grenade.*

The accused was charged with three offences, possession of pistols, ammunitions and explosives under the Internal Security Act 1960 alleged to have been committed on 13 January 1978 at about 8.45 p.m. at a coffee plantation in GSA, Sepuluh Estate, Paloh, Kluang. On 12 January 1978 at about 2.45 a.m. PW2 Insp. Jose Chako and five other police officers raided an unnumbered house at Paloh, Kluang and arrested the accused who was taken to Kluang Police Headquarters. He was later interrogated by Inspector Soh Hok Beng assisted by Inspector Chin Boon Chiun and Inspector Muharam. On 13 January 1978 after a series of interrogations, the accused revealed to Inspector Soh that he knew the whereabouts of the firearms and that he could lead them to the place where the firearms were buried. At about 8.45 p.m. the accused led ASP Chan Kok Kong and a police party including Inspector Soh to his coffee plantation to a fallen tree-trunk situated at the fringe of the plantation. He pointed to the place saying to Inspector Soh that, that was where the firearms were buried. The police party then dug the place and recovered 3 containers buried in the ground which contained 3 pistols, detonators, live ammunitions and short-barrel gun holsters. The pistols and the short-barrel gun holsters were taken to Kluang Police Headquarters whereas the detonators and the home-made primed hand-granades were left at the scene under the charge of ASP Faisal as they were considered dangerous to be removed.

On 14 January 1976 at about 10.30 a.m., an Army Bomb Disposal Unit went to the scene and after certifying them as serviceable, exploded them. Tests were carried out by an Armament Officer on the pistols, ammunitions and magazines and they were all found to be serviceable and ammunitions alive.

The whole evidence rested on the statement of the accused to Inspector Soh Hok Beng PW3 which led to the discovery of firearms, ammunitions and explosives referred to in the charges. The accused gave evidence on oath, denying the charges. He challenged the validity of the statement which he denied he ever made. His Counsel *inter alia* raised that the non-production of the statement recorded from the accused by PW3 raises presumption under s. 114(g) Evidence Act and unfavourable to prosecution to call as a witness, Inspector Chin Boon Chiun who was present when the accused made the statement and that it was fatal against making the statement admissible under s. 27 of the Evidence Act, Counsel also argued about the definition of the word "control" in s. 57(1)(a) & (b) of the ISA and that the exhibits were recovered from a public path.

Held:

[1] PW3's record would not be admissible in evidence except that it could be used as his diary to refresh his memory only. (*PP v. Er Ah Kiat* [1966] 1 MLJ 9).

[2] Calling of witnesses had always been the discretion of the prosecution. Presumption under s. 114(g) of the Evidence Act cannot arise here unless there was an attempt at concealment of those witnesses by the prosecution. Here, they were present in Court and freely offered to the defence. (See *Samsuddin v. PP* [1962] MLJ 405). Such presumption cannot arise, and in this case, such failure to call witnesses cannot affect the admissibility of the statement under s. 27 of the Evidence Act.

[3] The evidence in the present case was also similar to the case in *PP v. Er Ah Kiat* [1966] 1 MLJ 9. It further showed that the accused led police party at night, at about 8.45p.m to the plantation and it took him only 5 minutes to point to the spot where the exhibits were buried. He would not have been so helpful to discover the firearms unless he had full knowledge of them and had in possession and control of them.

[4] There were no unsatisfactory features seriously affecting the credit of the prosecution's case. The accused had not raised any reasonable doubt that he had not made the statement to PW3, nor did he raise any doubt that he was in possession and control of the items referred to in the three charges without lawful excuse or authority. Upon this evidence the accused was found guilty and convicted of the offences charged.

[Accused found guilty & convicted.]

Cases referred to:

Chong Soon Koy v. PP [1977] 2 MLJ 78
Leow Nghee Lim v. Reg. [1956] 22 MLJ 28
Public Prosecutor v. Mohamed Ali [1962] 28 MLJ 257
PP v. Er Ah Kiat [1966] 1 MLJ 9
Samsuddin v. PP [1962] MLJ 405
Queen v. Murugan Ramasamy [1964] 3 WLR 632

Legislation referred to:

Evidence Act 1950, ss. 24, 27, 114 illus(g)
Internal Security Act 1960, s. 57(1)(a), (b)

For the accused - W.D. Moses; M/s. Moses & Saga; Teh Poh Teik; M/s. Abdul Rahman Saad & Associates
For the prosecution - John Louis O'Hara, DPP

JUDGMENT

Mohd. Yusoff Mohamed J:

The accused, Chuy Pak Kam was charged with three offences which he was alleged to have committed at about 8.45p.m on 13 January 1978 at a coffee plantation in GSA Sepuluh Estate, Paloh, in the district of Kluang, State of Johore under the Internal Security Act 1960. The offences are as follows:

1) For possession of firearms to wit:

   a) one Spanish made Star automatic 9 m.m. pistol No. 5285282,

   b) one Spanish made Star automatic 0.32 pistol No. 4438884 and

   c) one Llama Special 7.65 m.m. automatic pistol No. 9966224

without lawful authority, an offence punishable under s. 57(1)(a) of the Internal Security Act 1960.

2) In control of ammunitions, to wit:

2 primed, home-made hand grenades without lawful authority, an offence punishable under s. 57(1)(b) of the Internal Security Act 1960 and

3) In control of explosives to wit:

4 detonators without lawful authority, an offence punishable under s. 57(1)(b) of the Internal Security Act 1960.

The facts show that:

On 12 January 1978, at about 2.45 a.m, PW2, Inspector Jose Chako, together with five police officers, raided and arrested the accused, Chuy Pak Kam at an unnumbered house behind Paloh Secondary School at Paloh, Kluang. He was taken to Kluang Police Headquarters where he was later interrogated by Inspector Soh Hok Beng, assisted by Inspector Chin Boon Chiun and Inspector Muharam.

On 13 January 1978, after a series of interrogations, the accused revealed to Inspector Soh Hok Beng that he knew the whereabouts of the firearms and that he could lead them to the place where the firearms were buried.

At about 8.45p.m on the same day, the accused led ASP Chan Kok Kong to his coffee plantation at GSA Sepuluh Estate Paloh. A police party including Inspector Soh Hok Beng accompanied them. At the plantation, the accused led them to a fallen tree-trunk situated at the fringe of the plantation. He pointed to the place saying to Inspector Soh that, that was where the firearms were buried.

The police party then dug the place where the accused pointed and there, recovered three containers buried in the ground. Two were plastic containers (Ex. P11A & B) and the other a milk-powder tin. From the first plastic container, ASP Arunasalam, PW4, recovered 3 pistols (Exhibits P2, P5 and P8). The second container contained detonators and live ammunitions. From the milk tin container was found assorted items such as short-barrel gun holsters.

Two of the containers were taken to Kluang Police Headquarters whereas the second container containing 4 detonators and two home-made primed hand-grenades were left at the scene under the charge of ASP Faisal. They were considered dangerous to be moved.

On 14 January 1976, at about 10.30 a.m, an Army Bomb Disposal Unit comprising of Sgt. Adnan bin Abdullah and Sgt. Ali bin Mohamed were called and together with a police party, went to the scene to destroy the detonators and hand-grenades. Photographs of the items for destruction were taken (Ex. P12C), after which Sgt. Adnan took possession of these items and after certifying them as serviceable, exploded them.

Tests were also carried out by ASP Mohd. Zaidon bin Pardi, PW1, an Armament Officer, on the other items recovered, that is, pistols, ammunitions and magazines. They were all found to be serviceable and ammunitions alive.

The whole evidence rests on the statement of the accused to police officer, Inspector Soh Hok Beng, PW3, which led to the discovery of firearms, ammunitions and explosives referred to in the charges. The statement made, was in Mandarin and rendered in English to the effect that:

I can lead you to the place where I buried the firearms.

Relying on s. 27 of the Evidence Act, this statement is admissible. (See *Chong Soon Koy v. PP* [1977] 2 MLJ 78):

> The fact discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to this. - per Suffian LP

The accused gave evidence on oath, denying the charges. He challenged the validity of the statement which he denied he ever made.

His Counsel raised certain features of the case which he referred to as unsatisfactory. He said that the accused was arrested in 1978 but only charged 4 years later in 1981. PW3 could not have spoken truly from memory without relying on notes or diary because of the length of time. He could not remember many vital points under cross-examination. His demeanour is questionable and is unsafe to be relied upon. He referred to *Leow Nghee Lim v. Reg.* [1956] MLJ 28 @ 30. "Many rogues" have excellent demeanour.

I would not comment on PW3's demeanour in detail, but sufficient to say that he gave evidence as any other police officers in execution of their duties and not in my view, as an interested party. There was nothing inherently improbable on what he said in evidence. (See *Public Prosecutor v. Mohamed Ali* [1962] MLJ 257). There was no cogent reason as shown in evidence for disbelieving him.

Referring to PW3's evidence who said that he had recorded the statement afterwards, accused's Counsel suggested that non-production of this record raises presumption under s. 114(g) Evidence Act and unfavourable to prosecution.

I do not think this is seriously contended. I believe that the learned Counsel knew that PW3's record would not be admissible in evidence except that it could be used as his diary to refresh his memory only. (*PP v. Er Ah Kiat* [1966] 1 MLJ 9 @ 10).

The learned Counsel then commented on the failure of prosecution to call as witness, Inspector Chin Boon Chiun who was present when the statement was made by the accused and says that it is fatal against making the statement admissible under s. 27 of the Evidence Act.

Calling of witnesses has always been the discretion of the prosecution. Presumption under s. 114(g) of the Evidence Act cannot arise here unless there was an attempt at concealment of those witnesses by the prosecution. Here, they were present in Court and freely offered to the defence. (See *Samsuddin v. PP* [1962] MLJ 405 @ 407). Such presumption cannot arise, and in this case, in my view, such failure to call witnesses cannot affect the admissibility of the statement under s. 27 of the Evidence Act.

The learned Counsel also warned the Court to act with caution and said that that s. 27 coupled with s. 24 of the Evidence Act is equated to an exception to the rule of confession.

It is sufficient to quote Viscount Radcliffe in *Queen v. Murugan Ramasamy* [1964] 3 WLR 632 @ 637 which says:

> It is worthwhile to make the observation at this point that the reason given for allowing it to be proved that accused person gave **information that led to the discovery of a relevant fact is not related in any special way to the making of a confession**. It qualifies for admission any such statement or information that might otherwise be suspected on the ground of a general objection to the reliability of evidence of that type. (Emphasis supplied).

The learned Counsel also submitted that the statement did not come from the accused personally because he was told by DW2, Chu Wang, his brother, to speak the truth.

There was no authority cited in support of this argument. The evidence does not show that both accused and DW2 were interrogated together or that the accused was compelled by DW2 to make the statement. If at all DW2 had told the accused to speak the truth on promise that he would not be charged though not proved, that in my view, would not make the statement inadmissible without again equating the giving of information with the making of a confession above.

The learned Counsel also made much argument about the definition of the word "control" in s. 57(1)(a) and (b) of the Internal Security Act. It is also said that the exhibits were recovered near a public path.

In *PP v. Er Ah Kiat* [1966] 1 MLJ 9, it was also submitted there that the hand-grenade was found in a public place and accordingly the accused had no exclusive control over the place, hence the hand-grenade. Raja Azlan Shah J (as he then was) held on these facts that:

> If the hand-grenade was discovered in consequence of the statement it would be evidence of his control even though the hand-grenade is concealed in a public place because unless he had control he would not have concealed it there.

In the present case, the evidence is almost similar and it further shows that the accused led police party at night, at about 8.45p.m to the plantation and it took him only 5 minutes to point to the spot where the exhibits were buried. In my view, he would not have been so helpful to discover the firearms unless he had full knowledge of them and had possession and control of them.

In summary, I find that there is no unsatisfactory feature seriously affecting the credit of prosecution's case. The accused has not raised any reasonable doubt that he had not made the statement to PW3, nor did he raise any doubt that he was in possession and control of the items referred to in the three charges without lawful excuse or authority. Upon this evidence I found him guilty and convicted him of the offences charged.

Also found at [1983] 1 CLJ 93